

## § 42.23

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the temporary visit abroad shall be required. If any required record or document is unobtainable, the provisions of § 42.65(d) shall apply.

(c) *Returning resident alien originally admitted under the Act of December 28, 1945.* An alien admitted into the United States under Section 1 of the Act of December 28, 1945 (“GI Brides Act”) shall not be refused an immigrant visa after a temporary absence abroad solely because of a mental or physical defect or defects that existed at the time of the original admission.

[56 FR 49676, Oct. 1, 1991, as amended at 63 FR 48578, Sept. 11, 1998]

### § 42.23 Certain former U.S. citizens.

(a) *Women expatriates.* An alien woman, regardless of marital status, shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that she was formerly a U.S. citizen and that she meets the requirements of INA 324(a).

(b) *Military expatriates.* An alien shall be classifiable as a special immigrant under INA 101(a)(27)(B) if the consular officer is satisfied by appropriate evidence that the alien was formerly a U.S. citizen and that the alien lost citizenship under the circumstances set forth in INA 327.

### § 42.24 Adoption under the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Intercountry Adoption Act of 2000.

(a) Except as described in paragraph (n), for purposes of this section, the definitions in 22 CFR 96.2 apply.

(b) On or after the Convention effective date, as defined in 22 CFR 96.17, a child habitually resident in a Convention country who is adopted by a United States citizen deemed to be habitually resident in the United States in accordance with applicable DHS regulations must qualify for visa status under the provisions of INA section 101(b)(1)(G) as provided in this section. Such a child shall not be accorded status under INA section 101(b)(1)(F), *provided that* a child may be accorded status under INA section 101(b)(1)(F) if Form I-600A or I-600 was filed before the Convention effective date. Al-

though this part 42 generally applies to the issuance of immigrant visas, this section 42.24 may also provide the basis for issuance of a nonimmigrant visa to permit a Convention adoptee to travel to the United States for purposes of naturalization under INA section 322.

(c) The provisions of this section govern the operations of consular officers in processing cases involving children for whom classification is sought under INA section 101(b)(1)(G), unless the Secretary of State has personally waived any requirement of the IAA or these regulations in a particular case in the interests of justice or to prevent grave physical harm to the child, to the extent consistent with the Convention.

(d) An alien child shall be classifiable under INA section 101(b)(1)(G) only if, before the child is adopted or legal custody for the purpose of adoption is granted, a petition for the child has been received and provisionally approved by a DHS officer or, where authorized by DHS, by a consular officer, and a visa application for the child has been received and annotated in accordance with paragraph (h) of this section by a consular officer. No alien child shall be issued a visa pursuant to INA section 101(b)(1)(G) unless the petition and visa application are finally approved.

(e) If a petition for a child under INA section 101(b)(1)(G) is properly filed with a consular officer, the consular officer will review the petition for the purpose of determining whether it can be provisionally approved in accordance with applicable DHS requirements. If a properly completed application for waiver of inadmissibility is received by a consular officer at the same time that a petition for a child under INA section 101(b)(1)(G) is received, provisional approval cannot take place unless the waiver is approved, and therefore the consular officer, pursuant to 8 CFR 204.313(i)(3) and 8 CFR 212.7, will forward the petition and the waiver application to DHS for decisions as to approval of the waiver and provisional approval of the petition. If a petition for a child under INA section 101(b)(1)(G) is received by a DHS officer, the consular officer will conduct any reviews, determinations or investigations requested by DHS with

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regard to the petition and classification determination in accordance with applicable DHS procedures.

(f) A petition shall be provisionally approved by the consular officer if, in accordance with applicable DHS requirements, it appears that the child will be classifiable under INA section 101(b)(1)(G) and that the proposed adoption or grant of legal custody will be in compliance with the Convention. If the consular officer knows or has reason to believe the petition is not provisionally approvable, the consular officer shall forward it to DHS pursuant to 8 CFR 204.313(i)(3).

(g) After a petition has been provisionally approved, a completed visa application form, any supporting documents required pursuant to § 42.63 and § 42.65, and any required fees must be submitted to the consular officer in accordance with § 42.61 for a provisional review of visa eligibility. The requirements in §§ 42.62, 42.64, 42.66 and 42.67 shall also be satisfied to the extent practicable.

(h) A consular officer shall provisionally determine visa eligibility based on a review of the visa application, submitted supporting documents, and the provisionally approved petition. In so doing, the consular officer shall follow all procedures required to adjudicate the visa to the extent possible in light of the degree of compliance with §§ 42.62 through 42.67. If it appears, based on the available information, that the child would not be ineligible under INA section 212 or other applicable law to receive a visa, the consular officer shall so annotate the visa application. If evidence of an ineligibility is discovered during the review of the visa application, and the ineligibility was not waived in conjunction with provisional approval of the petition, the prospective adoptive parents shall be informed of the ineligibility and given an opportunity to establish that it will be overcome. If the visa application cannot be annotated as described above, the consular officer shall deny the visa in accordance with § 42.81, regardless of whether the application has yet been executed in accordance with § 42.67(a); provided however that, in cases in which a waiver may be available under the INA and the consular officer deter-

mines that the visa application appears otherwise approvable, the consular officer shall inform the prospective adoptive parents of the procedure for applying to DHS for a waiver. If in addition the consular officer comes to know or have reason to believe that the petition is not clearly approvable as provided in 8 CFR 204.313(i)(3), the consular officer shall forward the petition to DHS pursuant to that section.

(i) If the petition has been provisionally approved and the visa application has been annotated in accordance with subparagraph (h), the consular officer shall notify the country of origin that the steps required by Article 5 of the Convention have been taken.

(j) After the consular officer has received appropriate notification from the country of origin that the adoption or grant of legal custody has occurred and any remaining requirements established by DHS or §§ 42.61 through 42.67 have been fulfilled, the consular officer, if satisfied that the requirements of the IAA and the Convention have been met with respect to the adoption or grant of legal custody, shall affix to the adoption decree or grant of legal custody a certificate so indicating. This certificate shall constitute the certification required by IAA section 301(a) and INA section 204(d)(2). For purposes of determining whether to issue a certificate, the fact that a consular officer notified the country of origin pursuant to paragraph (i) of this section that the steps required by Article 5 of the Convention had been taken and the fact that the country of origin has provided appropriate notification that the adoption or grant of legal custody has occurred shall together constitute prima facie evidence of compliance with the Convention and the IAA.

(k) If the consular officer is unable to issue the certificate described in paragraph (j) of this section, the consular officer shall notify the country of origin of the consular officer's decision.

(l) After the consular officer determines whether to issue the certificate described in paragraph (j) of this section, the consular officer shall finally adjudicate the petition and visa application in accordance with standard procedures.

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(m) If the consular officer is unable to give final approval to the visa application or the petition, then the consular officer shall forward the petition to DHS, pursuant to § 42.43 or 8 CFR 204.313(i)(3), as applicable, for appropriate action in accordance with applicable DHS procedures, and/or refuse the visa application in accordance with § 42.81. The consular officer shall notify the country of origin that the visa has been refused.

(n) Notwithstanding paragraphs (d) through (m) of this section, an alien described in paragraph (n)(1) of this section may qualify for visa status under INA section 101(b)(1)(G)(iii) without meeting the requirements set forth in paragraphs (d) through (m) of this section.

(1) Per Section 4(b) of the Inter-country Adoption Simplification Act, Public Law 111-287 (IASA), an alien otherwise described in INA section 101(b)(1)(G)(iii) who attained the age of 18 on or after April 1, 2008 shall be deemed to meet the age requirement imposed by INA section 101(b)(1)(G)(iii)(III), provided that a petition is filed for such child in accordance with DHS requirements not later than November 30, 2012.

(2) For any alien described in paragraph (n)(1) of this section, the “competent authority” referred to in INA section 101(b)(1)(G)(i)(V)(aa) is the passport issuing authority of the country of origin.

[72 FR 61305, Oct. 30, 2007, as amended at 76 FR 67363, Nov. 1, 2011]

### Subpart D—Immigrants Subject to Numerical Limitations

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

#### § 42.31 Family-sponsored immigrants.

(a) *Entitlement to status.* An alien shall be classifiable as a family-sponsored immigrant under INA 203(a) (1), (2), (3) or (4) if the consular officer has received from DHS a Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval,

and the consular officer is satisfied that the alien has the relationship to the petitioner indicated in the petition. In the case of a petition according an alien status under INA 203(a) (1) or (3) or status as an unmarried son or daughter under INA 203(a)(2), the petitioner must be a “parent” as defined in INA 101(b)(2) and 22 CFR 40.1. In the case of a petition to accord an alien status under INA 203(a)(4) filed on or after January 1, 1977, the petitioner must be at least twenty-one years of age.

(b) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child of a family-sponsored first, second, third or fourth preference immigrant or the spouse of a family-sponsored third or fourth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 61 FR 1836, Jan. 24, 1996]

#### § 42.32 Employment-based preference immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as indicated below.

(a) *First preference—Priority workers—*  
(1) *Entitlement to status.* An alien shall be classifiable as an employment-based first preference immigrant under INA 203(b)(1) if the consular office has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such Preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(1).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based first preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and